IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.8.2007

CORAM:

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
AND
THE HONOURABLE MR.JUSTICE R.REGUPATHI

W.A.No.3934 of 2004

A.Ponnambalam .. Appellant/Petitioner in WP No1273/95

Vs

1. The Deputy Commissioner of Labour
   (Appellate Authority under Payment
   of Gratuity Act), Tiruchirapalli-20.

2. The Assistant Commissioner of Labour
   (Controlling Authority under Payment
   of Gratuity Act, 1972)
   Tiruchirapalli-20.

3. Swami Bodananda
   Manager, Thapovanam Press
   Thiruparaithurai .. Respondents/Respondents/ in WP.No.1273/95

PRAYER: Appeal under Clause 15 of the Letters Patent against the order of the learned Single Judge dated 5.6.2002 made in W.P.No.1273 of 1995.writ petition filed under Article 226 of the constitution of India praying to issue Writ of Certiorari calling for the records pertaining to order of the 1st respondent passed in P.G.Apeal No.11/93 dated 30.12.1993 and quash the same.

For Appellant : Mr.D.Rajagopal
For Respondents : No appearance

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JUDGMENT

(Delivered by P.D.DINAKARAN,J.)

The unsuccessful petitioner is the appellant in this appeal, which arises from the order of the learned Single Judge dated 5.6.2002 made in W.P.No.1273 of 1995.

2. For the sake of convenience, the parties are arrayed as per their rank in the writ petition.

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3.1. The genesis of the proceedings leading to the present case, shorn of unnecessary details, may be stated thus:

The petitioner was an employee under the third respondent/employer on daily wage basis. He was appointed under the third respondent/employer on 1.1.1956, however, the third respondent/employer closed its operation during February, 1965 and thereafter, reopened the establishment only during December, 1966 and the petitioner continued to serve the third respondent/employer after reopening of the establishment. When the petitioner was transferred from Tiruparaithurai to Madurai, he did not report duty at Madurai, which resulted in his termination on the ground that he voluntarily abandoned service. After he was terminated from service on 9.7.1990, he made an application for payment of gratuity before the second respondent/original authority under Section 4(1) of the Payment of Gratuity Act, 1972 (for brevity, the "Act") on 13.12.1990.

3.2. Before the second respondent/original authority, the third respondent/employer submitted that, in view of his voluntary abandonment of service, the petitioner is not entitled to gratuity. The third respondent/employer also denied that the petitioner had been in continuous service for 35 years and stated that the petitioner had put in only 25 years service and his daily wage was Rs.21.67.

3.3. The second respondent/original authority, by order dated 30.3.1992, observing that, even assuming the petitioner has abandoned his service, the third respondent/employer has not initiated disciplinary action against the petitioner, and following the decision in DCM v. Shambhu Nath Mukherji, (1977) 4 SCC 415 wherein it is held that automatic striking of name of workman from rolls without passing orders would amount to retrenchment within the meaning of Section 2(oo) of the Industrial Disputes Act, held that such retrenchment is a termination of service and falls within the scope of Section 4(1) of the Act entitling the petitioner to gratuity. However, as the petitioner failed to produce any materials to show that he was in service from 1956 to 1966, the second respondent/original authority taking the last drawn daily wage of the petitioner as Rs.21.67 and his span of service as 25 years, from December, 1966 to July, 1990, directed the third respondent/employer to pay a sum of Rs.8,126/- to the petitioner within thirty days from the date of the order.

3.4. Against the said order dated 30.3.1992, the petitioner and the third respondent/employer preferred appeals before the first respondent/Appellate Authority. While the petitioner preferred the appeal being aggrieved against the non-consideration of his service during the period from 1956 to 1965 for the purpose of calculating gratuity, contending that the third respondent/Management ought to have produced the service records, and sought to modify the order of the second respondent and to allow his claim in full with interest, the third respondent/employer preferred the appeal contending that third respondent/employer is a charitable institution and cannot be construed as an establishment and therefore, the provisions of the Act are not applicable to the case on hand.

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3.5. The first respondent/Appellate Authority, by order dated 4.1.1993, even though held that the provisions of the Act would apply to the third respondent/employer, remitted the matter to the second respondent/original authority to determine the length of service based on the service records.

3.6. After remittance, the second respondent/original authority, by order dated 15.6.1993, finding that no fresh materials were produced, confirmed its earlier order dated 30.3.1992, and the same was confirmed by the first respondent/ appellate authority by order dated 30.12.1993.

3.7. Exasperated, the petitioner has preferred a writ petition in W.P.No.1273 of 1995 seeking issue of a writ of Certiorari to call for the records pertaining to the order of the first respondent in P.G.Apeal No.11/1993, dated 30.12.1993 and to quash the same as illegal, void and ultra vires.

3.8. The learned Single Judge, by order dated 5.6.2002, finding that the second respondent/original authority and the first respondent/appellate authority reached at a conclusion on the basis of the materials placed before them and observing that the issue raised is purely a question of fact, dismissed the writ petition. Hence, the present appeal.

4. Mr.D.Rajagopal, learned counsel for the petitioner, fairly submits that the question of facts as to the daily wage and length of service of the petitioner cannot now be agitated before this Court. However, he contends that the right of the petitioner to seek interest under Section 7 (3-A) of the Act from 9.7.1990, viz., the date on which the gratuity has become payable, cannot be denied and both the second respondent/ original authority and the first respondent/appellate authority in their orders referred to above, have not dealt with the issue regarding interest on the gratuity amount payable to him. In this regard, the learned counsel for the petitioner places reliance on the decision in H.Gangahanume Gowda v. Karnataka Agro Industries Corpn. Ltd., AIR 2003 SC 1526, wherein it is held that the claim for interest for the delayed payment of gratuity is statutory and award of interest is mandatory on the part of the authorities.

5. There is no representation on behalf of the respondents.

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6. We have given our careful consideration to the submissions made on behalf of the petitioner and waded through the materials produced before us.

7. It is well settled proposition of law that in a petition under Article 226, the Court has jurisdiction to try issues both of fact and law. When the petition raises complex questions of fact which may, for their determination, require oral evidence to be taken and on that account the Court is of the view that the disputed statement may not be

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appropriately tried in a writ petition, the Court should ordinarily decline to try the petition. Thus, a Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right, question of fact may fall to be determined. Ultimately, the question is one of discretion which is to be exercised in conformity with judicial principles [vide New Okhla Industrial Development Authority v. Kendriya Karamchari Sahkari Grih Nirman Samiti, (2006) 9 SCC 524].

8. In the case on hand, the second respondent/original authority as well as the first respondent/appellate authority came to the conclusion that the petitioner is entitled to gratuity, but they have not awarded any interest to the petitioner. In our considered opinion, the order of the first respondent/appellate authority dated 30.12.1993 borders on perversity to that extent and cannot be sustained, as payment of gratuity with or without interest, as the case may be, does not lie in the domain of discretion but it is a statutory compulsion. Specific benefits expressly given in a social beneficial legislation cannot be ordinarily denied. Employees on retirement have valuable rights to get gratuity and any culpable delay in payment of gratuity must be visited with the penalty of payment of interest [vide H.Gangahanume Gowda v. Karnataka Agro Industries Corpn. Ltd., AIR 2003 SC 1526].

For the aforestated reasons, we allow this appeal and modify the order of the first respondent/appellate authority dated 30.12.1993, thereby granting interest payable as per the provisions of the Act on the amount awarded from the date of termination, viz., 9.7.1990, till the date of the award, viz., 30.12.1993. The third respondent/employer shall workout the amount payable and pay the same to the petitioner within three months from the date of receipt of copy of this judgment. This writ appeal is allowed to the extent indicated above. No costs.

sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

sasi

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To:

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2. The Assistant Commissioner of Labour
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   Tiruchirapalli-20.

+ 1 cc to Mr.D.Rajagopal Advocate SR.NO.53113

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